NO. 88-510

FILED
SEP 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the
Supreme Court of the United States
OCTOBER TERM, 1988

HERMAN J. SMITH AND SHIRLEY B. SMITH,
Petitioners

VERSUS

NICKLOS DRILLING COMPANY, ET AL.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

JOHN R. PETERS, JR.
JONES, WALKER, WAECHTER,
POITEVENT, CARRERE & DENEGRE'
5000 Place St. Charles
201 St. Charles Avenue
New Orleans, Louisiana 70170
Telephone: (504) 582-8000

LOUIS J. ST. MARTIN
ESTELLE E. MAHONEY
LOUIS J. ST. MARTIN,
A PROFESSIONAL LAW CORPORATION
#1 Church Street
Post Office Box 3320
Houma, Louisiana 70361
Telephone: (504) 868-9600

COUNSEL FOR PETITIONERS,
HERMAN J. SMITH
and SHIRLEY B. SMITH

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

23pp

QUESTIONS PRESENTED

Whether the Fifth Circuit Court of Appeals erred in affirming the District Court's granting of defendant's Motion for Summary Judgment on Petitioner's, Herman Smith's, claim to seaman status when there existed disputed material facts which presented a genuine issue for trial?

Whether a Jones Act seaman loses status, as a matter of law, by virtue of a temporary shoreside assignment?

LISTING OF ALL THE PARTIES

Undersigned counsel for Petitioners, Herman J. Smith and Shirley B. Smith, provides the following list of parties as required by Supreme Court Rule 21.1(b):

1) Herman J. Smith

2) Shirley B. Smith

3) Nicklos Drilling Company
A Division of Nicklos Oil and Gas Company

4) Compass Insurance Company

/s/ Estelle E. Mahoney, T. A.

ESTELLE E. MAHONEY, T. A.
Counsel for Petitioners, Herman J. Smith and Shirley B. Smith

TABLE OF CONTENTS

Page

Questions Presented for Review.....i
Listing of All The Parties.....ii
Table of Contents.....iii
Table of Authorities.....iv
Opinions Below.....v
Statement of Jurisdiction.....1
Statement of the Case.....2
Argument.....3
Conclusion.....8
Certificate of Service.....10
Appendix A.....A-1
Appendix B.....A-6
Appendix C.....A-8

TABLE OF AUTHORITIES

CASE Page

5 Wright & Miller, *Federal Practice & Procedure,* Section 1372.....1

Barrett v. Chevron, U.S.A., Inc., 781 F.2d 1067 (5th Cir. 1986).....4,6

Bryson v. Brand Insulations, Inc. 621 F.2d 556 (3rd Cir. 1980).....1

Collins v. Bolton, 287 F.Supp. 393 (N.D. Ill. 1968).....1

Guidry v. South Louisiana Contractors, Inc., 614 F.2d 337, 453 (5th Cir. 1980) 692 F.2d at 265.....4,7

Manguia v. Chevron Company, U.S.A., 768 F.2d 649, 652 (5th Cir. 1959).....6

Savoie v. Otto Candies Company, Inc., 692 F.2d 363 (5th Cir. 1982).....4,6,7

STATUS AND RULES

28 U.S.C. Section 2101.....2

46 U.S.C. Section 688 *et seq.*.....3

Rule 17.1(a) - Supreme Court Rules.....2

Rule 21.1(b) - Supreme Court Rules.....ii

Rule 54 - Federal Rules of Civil Procedure.....1

Rule 56 - Federal Rules of Civil Procedure.....1

IN THE
Supreme Court Of The United States
OCTOBER TERM, 1988

HERMAN J. SMITH, ET AL,
Petitioners

VERSUS

NICKLOS DRILLING COMPANY, ET AL.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

ORIGINAL PETITION FOR WRIT OF CERTIORARI

STATEMENT OF JURISDICTION

This Petition for Certiorari arises out of the granting by the United States District Court for the Eastern District of Louisiana of a Motion for Summary Judgment brought by the Respondents, Nicklos Drilling Company, A Division of Nicklos Oil and Gas Company ("Nicklos") and Compass Insurance Company, filed pursuant to Rule 56 of the Federal Rules of Civil Procedure, dismissing Petitioners' case. Judgment in favor of the Respondents was entered on December 23, 1986. Said Judgment was a final, appealable judgment on the merits of a controversy within the meaning of Rule 54 of the Federal Rules of Civil Procedure. See, e.g. *Bryson v. Brand Insulations, Inc.*, 621 F.2d 556 (3rd Cir. 1980); *Collins v. Bolton*, 287 F.Supp. 393 (N.D. Ill. 1968). See, also, 5 Wright & Miller, *Federal Practice and Procedure*, Section 1372.

The decision of the United States District Court for

the Eastern District of Louisiana was affirmed on appeal by the Fifth Circuit of the United States Court of Appeals, on April 5, 1988. Subsequently, on May 23, 1988, Petition for Rehearing and Rehearing En Banc, filed by Petitioners were denied.

The Supreme Court of the United States may properly exercise its power of supervision as the Appellate Court's ruling herein is in conflict with other decisions in the Fifth Circuit.

Rule 17.1(a) of the Supreme Court Rules and 28 U.S.C. Section 2101 confer on this Honorable Court's jurisdiction to review the judgment in question by writ of certiorari.

STATEMENT OF THE CASE

Petitioner, Herman J. Smith, first commenced employment with Nicklos in 1961 and worked for them from 1961 through 1965. In 1968, he was re-employed by Nicklos and for the next fifteen (15) years, worked for Nicklos as a mechanic and seaman and member of the crew of Nicklos Rig No. 20, a movable, diesel powered, semi-submersible, barge drilling rig. During that time, Smith typically worked a "7 on/7 off" hitch.

On March, 1983, Nicklos Rig No. 20 and Nicklos Rig No. 21, another movable, semi-submersible, diesel powered barge drilling rig, were "stacked." However, from March 1983 Smith continued to work on Nicklos Rig No. 20, *inter alia*, performing mechanic and maintenance work on the rig. On October 23, 1983, Smith and his relief mechanic, Henry Rogers were "laid off" due to lack of work. Smith subsequently "returned" to work for Nicklos in November, 1983. Significantly, Nicklos' report of Smith's November 12, 1983 accident gives his "date of hire" as November *1968* rather than November 1983.

In late 1983, Nicklos purchased two "electric over diesel" powered semi-submersible movable drilling rigs

which were given the designation Nicklos Rig No. 32 and Nicklos Rig No. 35. Nicklos Rig No. 20 and Nicklos Rig No. 21 were taken out of service.

Smith's accident occurred on November 12, 1983, on Nicklos Drilling Rig No. 25, a fixed land rig. The accident occurred when a two-inch rubber air hose used to supply air to a Kelly spinner[1] blew off of a steel air line made up by means of a "quick connection" - a clamp and screw mechanism, rather than a connection fabricated into the line. As a result of that accident, Smith sustained, *inter alia*, an open depressed right frontal skull fracture, which required surgery for debridement of dead brain tissue under the fracture and repair of the lining of the brain. As a result of the head injury, Smith sustained bilateral frontal lobe damage. In the accident, Smith also sustained injuries to his left leg and knee and to his right hand. Additionally, Smith was rendered physiologically impotent. At the time the Respondents' Motion for Summary Judgment was granted, Smith was still undergoing active medical treatment for all of his injuries.

Petitioners' claims were filed pursuant to the Jones Act, 46 U.S.C. Section 688 *et seq.* and the General Maritime Law. This was the basis of federal jurisdiction in the court of first instance.

ARGUMENT

The Fifth Circuit's decision is in conflict with longstanding jurisprudence in that circuit and acts to deprive Petitioners of their constitutional right to trial by jury. It impermissibly substitutes its judgment for that specifically allotted to the fact finder under the Jones Act.

The Fifth Circuit stated at page 599 of its opinion that both Smith's work location and status were permanently changed. It went on to further state:

---

[1] A Kelly spinner makes up to drilling pipe when pipe connections are made in the field.

> Smith argues that the permanency of this change should have been a fact for the jury to decide. The permanency, however, was undisputably established when the old barge rig was finally removed from service; he was never to return to the status of crew-member on that vessel.

It was undisputed that Smith was a Jones Act seaman in the employ of Nicklos at some point *not long* before his injury. However, as noted in *Savoie v. Otto Candies Company, Inc.*, 692 F.2d 363 (5th Cir. 1982), the holding in which Petitioners submit was not changed by *Barrett*, at 365:

> [H]ow long a seaman's status continues after a shoreside assignment *is itself a fact question* dependant upon such factors as the duration of the assignment, its relationship to the employer's business, whether the employee was free to accept or reject it without endangering his employment status and any other factors relative to the ultimate inquiry ... [citing] *Guidry v. South Louisiana Contractors, Inc.*, 614 F.2d 447, 453 (5th Cir. 1980) 692 F.2d at 365 (Emphasis added.)

As should have been abundantly clear from the record, all of the factors mentioned by the *Savoie* Court were in dispute when the District Court granted Respondents' Motion and their resolution was for the jury. The Fifth Circuit, given those disputed facts should have reversed that District Court and ordered the matter to proceed to trial.

The testimony of Flossie LeDoux, Nicklos' Claim Manager, upon which Nicklos placed its main reliance, revealed the existence of crucial disputed issues of material fact which should have precluded the grant of summary judgment. Respondents took the position that Smith was *permanently reassigned* to a land job. While the Fifth

Circuit inexplicably accepted that argument, at page 34 of Mrs. LeDoux's deposition, she expressly "denies" that this change occurred:

> Q. Do you have, Mrs. LeDoux, any written document that indicates that Herman Smith was permanently reassigned to a land job?
>
> A. Actually, I can't say that anybody is permanently assigned to any particular rig, not permanently. I mean in the drilling business, you can't say that he's permanently assigned to any particular rig or anyplace.

At page 599, the Fifth Circuit stated:

> Unlike cases where we look to see if the worker is moved frequently from vessel to vessel within a fleet so as to qualify the worker as a crewman on a vessel, Smith had been permanently assigned to one barge rig which was removed from service. He was then reassigned to a land rig. It necessarily follows that Smith's regular assignment was changed when Nicklos Rig No. 20 was decommissioned.

Admittedly, Mrs. LeDoux testified at page 27 of her deposition that Smith was not going to be assigned to one of the two new vessel rigs when they were put in service because they were electric powered rigs as opposed to the diesel powered rigs on which Smith had previously worked. However, Henry Rogers, Smith's relief mechanic during Smith's admitted tenure as a seaman, testified that Nicklos Rig No. 35 was equipped with two *diesel engines* that generate the electric power for the rig and that the essential nature of his job duties as a "mechanic" did not change when he was transferred from Nicklos Rig No. 20, a diesel rig, to Nicklos Rig No. 35, an electric rig. See Depo. Rogers, pp. 14-15.

Furthermore, the two other Nicklos *diesel* mechanics, Hadley and Atalese, had worked on Nicklos Rig No. 21, also a diesel powered rig. They were put ot work on the electric rigs. Under controlling jurisprudence, Petitioners were entitled to present this evidence to the jury as it is evidence from which the jury could have concluded that *but for* the fact he sustained an injury in November, 1983, Smith would indeed have been transferred to one of the two new electric powered vessel rigs.

This dispute as to whether Smith's "assignment" to the land rig was permanent in nature, (thus representing a permanent change in job location which, under *Barrett,* would require assessment of his claim to seaman's status solely on the basis of his activities in his "new job") was for the jury to resolve after a trial on the merits. The evidence of record at the time the motion was granted was not viewed by the Fifth Circuit or by District Court - as it should have been - "in a balance that gives utmost weight to the worker's evidence and the presumptions and inferences logically deductible from that evidence." *Munguia v. Chevron Co. U.S.A.,* 768 F.2d 649 (5th Cir. 1985). Had the evidence of record been viewed in the correct manner, it should have been abundantly clear to the Fifth Circuit that there was at least an evidentiary basis for the issue of seaman's status to be submitted to the jury.

In *Savoie v. Otto Candies, Inc.,* 692 F.2d 393 (5th Cir. 1982), cited to the Fifth Circuit Panel and the District Judge, the factual situation involved therein is closely analagous to those present in the instant case. In that case, the jury's finding of seaman status was affirmed on appeal.

In *Savoie,* the plaintiff, began working for Otto Candies, Inc. in February 1978 as a deckhand aboard its vessels. He worked as a deckhand until August 1978 when

he suffered a fractured leg in an automobile accident. As noted by the *Savoie* court in footnote 1 at page 365, there was no evidence concerning his status at the time of the 1978 injury.

Plaintiff returned to work in mid-1979 and was assigned to a Candies vessel as a deckhand, where he worked until Spetember 1979. In September the metal rod in his leg was surgically removed and on October 11, 1979, plaintiff was mistakenly returned to the Candies vessel as a deckhand, a "full-duty" assignment. However, due to a later "discovery" that the plaintiff was, in fact, restricted to "light duty", Candies took him off the vessel. Six days later, plaintiff went to the Candies office to pick up his paycheck and was told that if he wanted a light duty job he could be assigned to clean some duck blinds owned by Otto Candies and *located on land* which Candies leased. Plaintiff accepted the assignment and, unfortunately, while working in muddy ground and on uneven terrain, he refractured his leg; that injury formed the basis of the suit against Otto Candies. As previously noted, the jury returned a finding in plaintiff's favor and found that he was a Jones Act seaman. On appeal, Candies argued that plaintiff at the time he was injured, had no vessel connection due to the fact that he was physically unable to work on a vessel, and therefore, not subject to the call of the vessel.

Noting that "normally the question of seaman status in a particular case is to be resolved by the fact finder" [692 F.2d at 365], the Fifth Circuit found that there was sufficient evidence for the jury to find that the plaintiff was a Jones Act seaman at the time he was injured. Citing *Guidry v. South Louisiana Constrctors, Inc.*, 614 F.2d 447 (5th Cir. 1980), the Fifth Circuit noted that there was no evidence of precisely how long the plaintiff's assignment to clean the duck blinds was to last. The *Savoie* court also

noted that plaintiff was to return to regular duty aboard the Candies vessel in approximately two weeks, had he not been injured. The evidence also showed that the duck blinds were used to entertain Candies' business clients and that plaintiff was reluctant to reject the assigment from his employer that he clean them. Particularly important to the issues involved in the instant appeal, the Fifth Circuit at page 366 noted:

> ... Nothing in the record conslusively establishes that [plaintiff's] general pattern of employment with Candies as a deckhand was changed by the temporary assignment to clean its duck blinds.

The record contains evidence from which a jury could have reasonably concluded that, in fact, Smith's tenure on Nicklos (land) Rig No. 25 was intended to be temporary in nature and that *but for* the fact of his injury, Smith would have been assigned to work aboard one of Nicklos' newly acquired vessel rigs as a mechanic. This contention receives particular support by the fact that Smith's uninjured counterparts aboard Nicklos Rigs No. 20 and 21 were, in fact assigned to those replacement vessel rigs, Nicklos Rig No. 32 and Nicklos Rig No. 35.

CONCLUSION

A myriad of disputed material facts of record precluded the grant of summary judgment in Respondents' favor. The Fifth Circuit gave short shrift to Petitioners' arguments and invaded the jury's province by making for itself the *factual* determination that Smith's job assignment had been permanently changed. This Court *has no*

choice but to grant certiorari to reverse the Fifth Circuit's decision and order the matter remanded for trial by jury.

Respectfully submitted:

ESTELLE E. MAHONEY
LOUIS J. ST. MARTIN,
A PROFESSIONAL LAW CORPORATION
Post Office Box 3320
Houma, Louisiana 70361
Telephone: (504) 868-9600

Counsel for Petitioners,
Herman J. Smith and
Shirley B. Smith

CERTIFICATE OF SERVICE

I, Estelle E. Mahoney, do hereby certify that I have this day mailed by United States mail, postage prepaid, a true and correct copy of the foregoing original brief of Petitioners to all counsel of record this 22nd day of August, 1988.

ESTELLE E. MAHONEY

APPENDIX A

HERMAN J. SMITH and Shirley B. Smith,
Plaintiffs-Appellants,

v

NICKLOS DRILLING COMPANY and
Compass Insurance Company,
Defendants-Appellees.

No. 87-3071.

April 5, 1988.

Seaman brought action to establish Jones Act coverage for injuries sustained while he was working on land rig. The United States District Court for the Eastern District of Louisiana, Veronica D. Wicker, J., granted summary judgment in favor of employer, and mechanic appealed. The Court of Appeals, Gee, Circuit Judge, held that mechanic, who had been permanently assigned to floating barge rig, was not entitled to Jones Act coverage for injuries sustained three weeks after he was reassigned to land rig and barge rig was decommissioned.

Affirmed.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before THORNBERRY, GEE and POLITZ, Circuit Judges.

GEE, Circuit Judge:

Once again we address one of our Court's prime recurring issues; has a particular injured worker been permanently assigned to or performed a substantial part of his work on a vessel so as to qualify to sue as a seaman under the Jones Act? Fashioning a bright line rule has troubled our court, *see Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067 (5th Cir. 1986), but the facts presented here do not approach the leinent line that we have drawn. We therefore affirm summary judgment for the defendant.

Facts

Appellant Herman Smith worked for several years as a mechanic for Nicklos Drilling Company aboard a floating barge rig known as Nicklos Rig No. 20. When No. 20 was retired from service in October 1983, Smith was reassigned to a land rig; and three weeks later he was injured on that rig while attempting to repair an air hose. About the time of his injury, two new barge rigs had just been purchased and put into service by Nicklos to replace Rigs No. 20 and No. 21.

Discussion

Smith contends that the two newly-purchased rigs constituted part of Nicklos' "fleet of vessels" and that, because he had been more or less permanently assigned to Nicklos' fleet, he was a crewman on that fleet when injured. We address this contention after a brief discussion of the law that controls our inquiry.

In *Offshore Company v. Robison*, 266 F.2d 769 (5th Cir. 1959), Judge Wisdom laid down for our court a two-pronged test for determining seaman status. The first prong requires that at the time of the injury, "the injured workman was *assigned permanently* to a vessel ... or

performed a *substantial part* of his work on the vessel." 266 F.2d at 779 (emphasis added).

Where the underlying facts are undisputed and the record reveals "no reasonable evidentiary basis to support a jury finding that the injured person is a seaman ... under the Jones Act," summary judgment is procedurally appropriate. *Beard v. Shell Oil Co.*, 606 F.2d 515, 517 (5th Cir. 1979). As for the substantive law of sometime seaman, we have held that:

> [T]he employee must be a seaman at the time his claim arises; the fact that he was once a seaman and that either he or his employer intend some day for him again to become one do not suffice to tint with blue water status all the events that happened in between, however remote in time and place from a vessel past or a vessel future.

Guidry v. South Louisiana Contractors, Inc., 614 F.2d 447, 453 (5th Cir. 1980).

Appellant urges us to read *Barrett* as erasing the above holdings of *Guidry*. To the contrary, *Barrett* confirms them, reflecting upon the problem of a worker drifting in and out of Jones Act coverage. Under the "substantial part of work" standard of the *Robison* test, a case outcome could be altered by the frame within which the court elects to assess "substantial part." As *Barrett* notes, if a worker's *regularly assigned duties* during a year's period require him to be on a vessel only twenty percent of the time, then the circumstance that he was injured on a vessel does not permit a finding that he was a crewmember under the Jones Act, even though he happened to have worked on the vessel for a week before the accident. 781 F.2d at 1076. This ruling pertains to assaying a regular assignment,

however, and has no application where *new* assignments are concerned.

Barrett underscores this important distinction:

> If the plaintiff receives a new work assignment before his accident in which either his essential duties or *his work location is permanently changed*, he is entitled to have the assessment of the substantiality of his vessel-related work made on the basis of his activities in his new job.

781 F.2d at 1075-76 (emphasis added).

The above passage controls this case. Neither of Smith's assignments required him to divide his time between vessel and land; rather, both his work location and status were permanently changed when the floating rig on which he had worked was decommissioned. Smith argues that the permanency of this change should have been a fact for the jury to decide. The permanency, however, was undisputably established when the old barge rig was finally removed from service; he was never to return to the status of crewmember on that vessel.

Smith also suggests that we should view his work as essentially a permanent assignment to a "fleet of vessels": while one is being decommissioned and two new ones are about to be put into service, his landside assignment does not cost him his seaman status. This argument poorly characterizes Smith's regularly assigned duties before the accident to a fleet of vessels; he had worked on one vessel for several years. Unlike cases where we look to see if the worker is moved frequently from vessel to vesel within a fleet so as to qualify the worker as a crewman on a "vessel", Smith had been permanently assigned to one

barge rig which was removed from service. He was then reassigned to a land rig. It necessarily follows that Smith's regular assignment was changed when Nicklos Rig No. 20 was decommissioned.

Smith cites *Savoie v. Otto Candies, Inc.*, 692 F.2d 363 (5th Cir. 1982) as support for his argument that his assignment to a land rig, and injury thereon, should not disqualify him from seaman status. In *Savoie*, a worker who had been injured in a non-work related accident came back to work on a vessel when his doctor's release form cleared him for light and regular duty. After one day at work, the employer received word from the doctor that a mistake had been made and the worker was, in fact, fit for light duty only. He was therefore temporarily assigned ashore and was injured while cleaning a duck blind.

The worker in *Savoie* was temporarily assigned to shore duty because of his injury. His regularly assigned duties were not changed by this temporary assignment, *however*, nor was the vessel to which he would have returned had he completed his convalescence placed out of commission. By contrast, Smith's regularly assigned duties on Rig No. 20 were fundamentally charged when Rig No. 20 was shut down. His assignment to land was permanent—which, as in determination of residence, means no more than "for an indefinite period"—not temporary. Nothing in life, alas, is *permanent*.

For the reasons stated, we AFFIRM the district court's grant of summary judgment to defendants in this case.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-3071

Filed May 25, 1988

HERMAN J. SMITH,
AND SHIRLEY B. SMITH, ET AL,
Plaintiffs-Appellants

versus

NICKLOS DRILLING COMPANY, A DIVISION
OF NICKLOS OIL & GAS COMPANY, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Louisiana

ON SUGGESTION FOR REHEARING EN BANC

(Opinion APRIL 5, 1988, 5 Cir., 198____, _____F.2d_____)

(MAY 23, 1988)

Before THORNBERRY, GEE and POLITZ, Circuit Judges

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ illegible

United States Circuit Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED
Dec 23 1986

HERMAN J. SMITH AND SHIRLEY B. SMITH	CIVIL ACTION
VERSUS	NO. 85-1556
NICKLOS DRILLING COMPANY A DIVISION OF NICKLOS OIL AND GAS COMPANY	SECTION "L"

J U D G M E N T

The Court having granted Nicklos Drilling Co., etc and Compass Insurance Company motion for summary judgment;

accordingly:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of the defendants and against plaintiffs dismissing plaintiffs' case at their costs.

New Orleans, Louisiana, this 17th day of December, 1986.

/s/ Vironica D. Wicker
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY DEC 23 1986